IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-312

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

DAVID WARE, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 19, 1970—Plaintiff Ware's complaint for class action and declaratory relief filed in Superior Court of the State of California in and for the City and County of San Francisco.

April 17, 1970—Defendant Merrill Lynch's answer to complaint filed in Superior Court, City and County of San Francisco.

April 17, 1970—Defendant Merrill Lynch's petition to order arbitration filed in the Superior Court, City and County of San Francisco, together with motion to stay proceedings.

April 20, 1970—Plaintiff's motion to determine class action filed in the Superior Court, City and County of San Francisco.

April 17—June 1, 1970—Plaintiff's and Defendant's memoranda of law and declarations filed re motions.

June 8, 1970—Hearing on petition to compel arbitration, motion to stay and motion to determine class action held, Superior Court, City and County of San Francisco, Hon. Robert W. Merrill, Judge.

June 9, 1970—Order filed denying petition to compel arbitration and granting motion to determine class.

August 3, 1970—Defendant Merrill Lynch's Notice of Appeal filed.

September 22, 1970—Appeal docketed, Court of Appeal, State of California, First Appellate District, San Francisco.

March 15, 1972—Opinion and Decree of the Court of Appeal, First Appellate District, filed, affirming order denying arbitration.

April 24, 1972—Petition for Hearing in Supreme Court of California filed.

May 10, 1972—Order of Supreme Court of California denying Petition for Hearing.

August 23, 1972—Petition for Writ of Certiorari filed.

Superior Court of the State of California, in and for the City and County of San Francisco

No. 612278

DAVID WARE, on behalf of himself and all others similarly situated,
Plaintiffs,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a corporation, FIRST DOE through TWENTIETH DOE,
Defendants.

PLAINTIFF'S COMPLAINT FOR CLASS ACTION/ DECLARATORY RELIEF

Filed January 19, 1970

Plaintiff complains on behalf of himself, and all others similarly situated who may come in and seek relief and contribute to the expenses of this action, and for cause of action alleges as follows:

I.

There is a well-defined community of interest in the questions of law and fact involved, affecting plaintiff and all other members, in the same manner in that said action is for declaratory relief to determine under applicable California law the validity of "The Merrill Lynch Profit Sharing Plan for Employees" and particularly Article 11.1 thereof in which all have a common claim and interest.

II.

Such other persons are so numerous that it is impracticable to bring all of them before this Court as individual plaintiffs, and therefore, this plaintiff sues for himself and for the benefit of all of said persons within the said class as the names and addresses of said persons are not known.

III.

Plaintiffs do not know the true names and capacities of the defendants sued herein as FIRST DOE through TWENTIETH DOE, said names being fictitious, and plaintiffs pray that when the true names and capacities of said defendants are ascertained, that this complaint may be amended accordingly.

IV.

Plaintiffs, and each of them, are now and were at all times herein mentioned residents of the State of California, and were employed by defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a corporation, in various positions at said defendant's offices throughout the State of California, including those offices within the City and County of San Francisco.

V.

At all times herein mentioned, defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., was and now is a corporation authorized to do and doing business in the State of California with offices in the City and County of San Francisco.

VI.

Plaintiffs, and each of them, pursuant to and during their respective employment relationship with defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., were entitled to and did in fact participate in "The Merrill Lynch Profit Sharing Plan for Employees" (The Plan), a copy of which plan is attached hereto as Exhibit "A" and incorporated herein by reference as though fully set forth.

VII.

Defendants, FIRST DOE through NINTH DOE, are members of the Administrative Committee appointed by defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., to administer said profit sharing plan.

VIII.

Defendants, TENTH DOE through TWENTIETH DOE, are the agents, custodians and trustees of the trust fund created under the terms of the profit sharing plan by defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

IX.

On or about July 14, 1958, at San Francisco, California, plaintiff, DAVID WARE, and defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., entered into an oral contract of employment wherein said defendant employed said plaintiff to render services for said defendant for compensation for an unspecified term.

X.

Plaintiff, DAVID WARE, accepted said employment at San Francisco, California, and agreed to render said services for defendant and in fact has performed all conditions,

covenants and promises under the said contract, on his part to be performed, within the City and County of San Francisco, State of California, the agreed place of performance.

XI.

Plaintiffs by reason of their employment, and during each year of their employment, by said defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., had credited to their respective employee trust accounts certain profit sharing units in accordance with their respective salaries, which units have monetary value and represent compensation for their labor, work and effort expended on behalf of defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

XII.

Pursuant to Article 5 and Article 8 of The Plan, certain of plaintiffs' profit sharing units credited to plaintiffs' accounts since December 30, 1960, have become vested and payable units upon severance of the employment relationship with defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. Plaintiff, DAVID WARE, voluntarily left the employ of defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., on March 17, 1969, in San Francisco, California, and other plaintiffs comprising the class as hereinabove defined likewise left said defendant's employ on dates presently unknown. All such plaintiffs have since entered into an employment relationship with firms involved in activities competitive with that of defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

XIII.

An actual controversy has arisen and now exists between the plaintiffs and defendants concerning their respective legal rights and duties under "The Merrill Lynch Profit Sharing Plan for Employees."

XIV.

Plaintiffs, and each of them, contend that they are each entitled to a cash payment of those profit sharing units standing in their respective accounts as of the date of severance of employment in which their rights have vested and with respect to those units credited for fiscal years subsequent to the year ended December 30, 1960, pursuant to Article 7 of The Plan; that Article 11.1 of The Plan is unlawful and void under California law in that it restrains plaintiffs from engaging in a lawful profession under threat of penalty and forfeiture of vested benefits; that The Plan is part of the contract of employment; and that said defendants unlawfully breached said contract by illegally and unjustifiably refusing to pay plaintiff, DAVID WARE, and all others similarly situated, their just benefits and earned rewards.

XV.

Defendants on the other hand dispute these contentions and assert that plaintiffs are not entitled to cash payments of those profit sharing units which have been credited to the respective plaintiffs' accounts from December 30, 1960, to the dates of their respective employment termination by reason of the provisions of Article 11.1 of The Plan as each of the plaintiffs who were denied their legal rights under The Plan entered into other gainful employment with competitive firms. Defendants further assert that said Article

11.1 is lawful and valid under California law, and does not unlawfully restrain plaintiffs from engaging in other lawful professions; and that The Plan is not a part of the contract of employment.

XVI.

Plaintiffs desire a judicial determination of their rights and the duties of defendants as hereinabove set out, and the amount of damages due plaintiffs respectively, if any.

WHEREFORE, plaintiffs pray for a declaratory judgment declaring the rights, duties and obligations of defendants towards defendants arising out of their employment relationship and the profit sharing plan hereinabove referenced and adjudicating that participation in The Plan is part of the employment relationship, that Article 11.1 of said plan is unlawful and void under applicable California law, that defendants are obligated to pay to plaintiffs, and each of them, all vested profit sharing units credited to their respective accounts from December 30, 1960, to their respective dates of termination, for costs of suit herein and for such other and further relief as the Court decides is just and proper.

FEENEY AND SPARKS
By /s/ JOSEPH C. BARTON
Joseph C. Barton
Attorneys for Plaintiffs

(JURAT OMITTED IN PRINTING)

Exhibit A to Complaint

THE Merrill Lynch
PROFIT SHARING PLAN
FOR EMPLOYEES (OTHER THAN IN CANADA)

Merrill Lynch, Pierce, Fenner & Smith Inc
70 Pine Street · New York 5, N. Y.

Underwriters and Distributors of Investment Securities
Brokers in Securities and Commodities

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A Short History of . . .

PROFIT SHARING at MERRILL LYNCH

Our Employees "Deferred" Profit Sharing Plan was officially born in 1945, but the history of profit sharing at Merrill Lynch goes back several years earlier, to the very inception of our modern firm. When the two main predecessor firms of the present corporation—Merrill Lynch, E. A. Pierce & Cassatt, and Fenner & Beane—merged in 1941 to form one of the largest limited partnerships in the world in the face of the past decade of depression and the uncertainties of our first bleak year of World War II, the faith of those "modern Wall Street pioneers" paid off almost at once.

Although the net profit for 1941 was only half-a-million dollars, it was the first net profit of any kind in many years for all the predecessor firms involved. The Messrs. Merrill, Pierce, Fenner, Smith *et al* were fully cognizant that the tide had been turned as much by the enthusiasm and hard work of every Merrill Lyncher of whatever rank or file, as for any other reason. In 1941 the Merrill Lynch partners paid out nearly 10% of the firm's profit in a cash profit sharing distribution (or "bonus" as Wall Streeters traditionally call it). There has, fortunately, been no "losing year" since; hence no year in which some sort of profit sharing distribution was not made to Merrill Lynch employees.

It's a long haul from that original $48,000 paid out to some 1,850 employees to the astronomical $30.4 contribution for some 10,400 employees 25 years later, via "Cash" and "Deferred" Profit Sharing, and into the Employees Pension Plan, for 1966. Note, too, that despite a six fold increase in the number of employees involved, $30.4 million is nearly 33% of 1966's net profit of $91.5 million, compared with that

original nearly 10% of net profit in 1941. And we have picked up some new profit sharing terms over that 25 years. We now refer to a "Deferred" as well as "Cash" profit sharing distribution; *and* a Pension Plan!

While all three of these employee benefits are obviously of a package—a voluntary sharing by MLPF&S Inc. of its profits with its employees, intended not only to reward MLers *now* but to provide them with a nest egg for the *future*—they are also all three *individual* benefits.

The MLPF&S Employees Pension Plan is explained in detail in a separate booklet all its own.

The CASH (or "Bonus") *Profit Sharing distribution*, as applicable, is explained in your Employees Handbook, *How WE Work*. So, too, is the "Deferred" Profit Sharing Plan, but, and necessarily there, only in generalities.

The "Deferred" Profit Sharing Plan is *the* official *Profit Sharing Plan for Employees* (other than in Canada) *of MLPF&S Inc.* At this writing (1967) it is already 22 years old. The original Plan has been amended, from time to time, to bring it more closely in line with its founders' original intentions that it should reward the long term *career*-Merrill Lyncher.

As Charles E. Merrill said in 1945: "We feel that our generous 'cash payment bonus' adequately adds extra rewards for the Merrill Lynchers in any particular year who helped make that year's profits possible. But we have long since felt the need for some extra-and-above reward beyond even that for those dedicated *career* men-and-women who hitch their wagons to our Merrill Lynch star not for the short, but for the long term—who, through lean years and fat, never lessen their individual efforts, ardor, nor loyalty to and for our mutual success. It is for them that their partners have created this Merrill Lynch Employees Profit

Sharing Plan. I hope that every such loyal employee will regard this Plan as a means towards that end. I only wish that we could have 'permissible incorporation' on the N.Y. S.E., could incorporate our firm and have an Employees Pension Plan with still added benefits for such career employees, too!"*

Now career-minded MLers have both!

In the next section we will discuss the Plan, as *now* constituted, in some pertinent details; then follow with a section of questions most often asked by employees, with the answers thereto of course; and finally, in the last section of this booklet, we print the full provisions of the Plan, in all their original, legal language, as amended through May 17, 1966 and as approved by the United States Treasury Department. The complete Plan may be inspected at the Personnel Department in New York City during business hours.

Incidentally: don't let the phrase "legal language" scare you; it's all perfectly clear, and furthermore, however *we* may or may not clearly interpret it in the earlier sections of this booklet, every Merrill Lyncher is strongly urged to read the official language of the Plan itself; which makes up the final section of this booklet.

NOTE . . . the Index at the end of the official Plan: this Index is by subject matter and will make it easy for you to refer directly to those Articles and Sections of the Plan containing the information you are seeking.

If, after all this, you still have some questions, please do not hesitate a moment in contacting—

The Secretary of the Administrative Committee
MLPF&S Inc. Employees Profit Sharing Plan
Home Office, 70 Pine Street, New York, N. Y. 10005

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*C.E.M. did not live to see it, but on January 12, 1959, under the leadership of Directing Partner Winthrop H. Smith and Managing Partner Michael W. McCarthy (who subsequently became our first Chairman of the Board, and President, respectively), MLPF&S incorporated. In that same year, the MLPF&S Inc. Employees' Pension Plan also became reality.

FOUR Amended

MLPF&S INC.

EMPLOYEES PROFIT SHARING PLAN

One saying we have never particularly agreed with is that "all good things come in small packages." Sometimes they come in rather large, and complicated, packages. In fact, from the ancient Assyrian Code of Hammurabi to our wonderful Constitution of the United States, to the provisions of our MLPF&S Inc. Employees Profit Sharing Plan —an excellent point could be made that "the best things in life worth having are most often anything *but* the least complicated." And you can undoubtedly make your own "excellent point" with your own favorite code, whatever it may be. . . .

In a General Information Memorandum to "All Employees" under date of August 15, 1961, the then President George J. Leness announced the first major amendments to the "Deferred Profit Sharing Plan of MLPF&S Inc." since its inception with these words:

"In 1945, after five years of straight cash profit sharing (i.e., "Bonus"), the firm adopted its present Deferred Profit Sharing Plan in order to make the future in an uncertain world more secure for all of those regularly affiliated with us.' As you know, the Plan's objectives are (1) to share the profits with the employees who helped make them possible; and (2) to build each member's share up to a considerable reserve against future emergencies and retirement.

"Thus Cash profit sharing is aimed at the present, while the Deferred Profit Sharing Plan is aimed at the future— the building of a retirement nest egg for our career employees.

"With this in mind, we reviewed our Deferred Plan to determine how well it has been meeting its objective since

1945. Our review indicated that the Plan is basically sound but, like any sixteen-year-old structure, it needed some renovation in order to more closely meet its objectives; and so, several changes have been made . . ."

First of all, NO changes were made in the generous formula according to which the firm makes its annual contribution to this Plan (see details in Index and answer to Question 3 in the next section of this booklet). Nor were any changes made in the practice of paying a "cash bonus," on *top of* salaries, Deferred Profit Sharing, Pension Fund, etc.

The major changes brought about by the 1960 amendments were as follows:

✓Whereas prior to 1961 an employee was entitled to 50% of his-or-her Profit Sharing units, payable in cash upon resigning from or being terminated from Merrill Lynch after one fiscal year, for Units credited in 1961 or thereafter it is necessary that at least three fiscal years of continuous employment shall have been fulfilled before an employee is entitled to any possible cash stake in his Profit Sharing credits upon leaving the firm. Such "severance payments" now start at 30% of the total number of any one person's units (see Index under "Payments"; also the answers to Questions 12, 13, and 16 in the next section). This refers only to employees who resign or are terminated before normal retirement; and has nothing to do with "death benefits," which are referred to further along in this section.

✓The scale of "accrual of rights for units credited in 1961 and subsequently" was realigned in favor of career employees who remain with Merrill Lynch for all, or most of, their working years until retirement (see Article 9 of the official "Profit Sharing Plan").

✓The Plan's Administrative Committee has now been awarded final discretion in deciding whether a retiring or terminating employee should receive such units as he is

entitled to in installments or in one lump sum (see "Administrative Committee" in Index).

Provisions have now been written into the official Plan (see Article 11 of the Plan, and the answer to Question 16 in our next section) for the forfeiture of all or some benefits accruing to members of the Plan if they, a- commit any act of willful dishonesty, either against the firm *per se* or in contravention of any regulatory authority, including the willful negligence of their Merrill Lynch duties; or b- leave Merrill Lynch under certain conditions to take employment deemed by the Administrative Committee to be competitive with this corporation or any of its subsidiaries.

In addition to these major changes, the Plan has been amended from time to time to set up the Canadian deferred Profit Sharing Plan and to clarify or update certain Articles. Let us now examine our MLPF&S Inc. Profit Sharing Plan as of now, exactly as it is—

YOUR STAKE IS IN UNITS . . .

Although most questions MLers might have about their Profit Sharing Plan are answered in the next "Questions & Answers" section, and of course all are answered in the final section which reprints the Provisions of the Plan in detail with an Index, the key to the whole Plan lies in one word, "Units," which we will discuss in added detail here.

Your stake in your Profit Sharing Plan is in Units—the Units that are originally assigned to you, that continue to be assigned to you so long as you remain a member of the Plan, and that grow in value over the years as the return from the Plan's invested funds comes in. Of course, like any investment, Units can go down in value too, but obviously over the long term (which is the way your Profit Sharing stake should be regarded in any event!) individual Units always have gone up in value.

Additional Units are credited annually to each member of the Plan under a formula based upon the ratio his annual compensation (including any adjusted compensation or cash bonus) bears to the compensation of all other members of the plan—to a maximum of $18,000 per person per annum.

Each year the firm allocates so-many dollars to its Employees Profit Sharing Fund; this amount is then divided by the amount each individual Unit was worth at its last evaluation (Units are revalued monthly), which results in a "total number of Units to be distributed this particular year." These Units are then distributed among all eligible MLers according to the "compensation formula" explained in the answers to Questions 6-7 next section, and in Article 3 of the Plan. Eligible employees then receive a notice from the Plan's Administrative Committee, informing them of a- the total number of Units previously to their credit; b- the number of Units credited to their individual accounts this year; and c- the total number of Units *now* to their individual credit.

For employees who were members of the Plan before 1961, there are now six different types of Units; for later members there are three. There would be no point in itemizing all these here since they are so itemized in the answer to Question 10, next section; and—of course you should refer to the Index of the Actual Provisions of the Plan. What we wish to point up here is that, since your annual notice of Units has them all lumped together, employees faced with an emergency under which they might wish to draw some "payable" units now, and wanting to know how many such, if any, they possess at this time, should refer to the Secretary of the Administrative Committee for this further breakdown on their individual positions.

The Administrative Committee also issues to all members of the Plan a semi-annual and an annual report detailing

all investments of your Profit Sharing Fund, their current status (i.e., profits *versus* losses), other pertinent information on the Plan's recent activities, and of course the latest value per Unit. Semi-annual reports usually come out during August; annual reports in February; and General Information Memoranda plus articles in *WE the People* come out whenever something noteworthy and newsworthy is to be announced.

The Profit Sharing Plan's funds are kept with the First National City Bank of New York, as custodian, under the Trusteeship of one attorney and two employes of MLPF&S Inc. This is not to be confused with actual administration of the Plan or the investment of its funds, which is the responsibility of from five to nine Administrative Committee members; duly appointed Merrill Lynchers from various Offices and Departments.

But so much for the origins, purposes, and amendments to our MLPF&S Inc. Employees Profit Sharing Plan. Let us now examine, specifically, the Plan itself, starting with some questions most commonly asked about it, and the answers thereto....

Typical Questions & Answers
ABOUT OUR DEFERRED PROFIT SHARING PLAN

1. What Is the Purpose of the Plan?

This Plan is a carefully prepared and supervised program. Its objectives are to share the profits of the firm with those who helped make them possible, and to help provide future financial security for those employees who are regularly affiliated with us.

Also, should an employee be faced with a financial emergency, some Profit Sharing Funds may be withdrawn, after a certain number of years of participation, providing such withdrawal has Committee approval.

It must be realized, however, that once units are withdrawn they cannot be returned to the Fund.

2. Who Handles the Plan?

The Administrative Committee, consisting of between five and nine members selected by the Corporation, interprets the Plan and makes all decisions necessary to carry out its provisions. Any decision by the Committee relative to the Plan will be conclusive and binding on all employees.

3. Do I Contribute to the Plan?

Definitely not. All contributions to the Plan are made solely by the Corporation. For each fiscal year, the Corporation contributes the following percentages of its net profits:

If profits are:	*The Contribution will be:*
Not over $2,000,000	8% of the net profits
Over $2,000,000 but not over $3,000,000	$160,000 plus 8½% of the excess over $2,000,000
Over $3,000,000 but not over $4,000,000	$245,000 plus 9% of the excess over $3,000,000
Over $4,000,000 but not over $5,000,000	$335,000 plus 9½% of the excess over $4,000,000
Over $5,000,000 but not over $6,000,000	$430,000 plus 10% of the excess over $5,000,000
Over $6,000,000 but not over $7,000,000	$530,000 plus 10½% of the excess over $6,000,000
Over $7,000,000 but not over $8,000,000	$635,000 plus 11% of the excess over $7,000,000
Over $8,000,000 but not over $9,000,000	$745,000 plus 11½% of the excess over $8,000,000
Over $9,000,000	$860,000 plus 12% of the excess over $9,000,000

4. What Happens to the Money in the Profit Sharing Trust Fund?

As you know, the Corporation's contribution is put into a trust fund for the benefit of all participants. But, this money does not lie idle—it is invested, by the Administrative Committee, in various securities, such as common and preferred stocks, corporate bonds, and United States Government obligations.

Every six months, the Administrative Committee issues a detailed report of the Fund's investments. Copies of this report are distributed to all employees, and we urge that you read these reports so you'll have a better understanding of just how your Profit Sharing Fund works for you.

The wisdom of allowing your units to remain in the Fund is demonstrated by the fact that in 1945 the unit was worth $1.00 and at the end of 1966, was worth $3.60.

5. Who Is Eligible to Participate?

Every full-time employee of the Corporation, except employees in Canada who are covered by a separate Profit Sharing Plan, who is employed for one full fiscal year is eligible. The necessary forms for acceptance of the Plan will be sent out each year to those employees who qualify.

Employees who are *not* eligible to participate are:

(1) those who are employed for a normal work week of less than thirty hours, and
(2) those who are paid on a daily or hourly basis.

6. On What Is My Share of the Contribution Based?

Your share of the Corporation's contribution, which will be expressed in units, is determined by the ratio that your compensation bears to the compensation of all eligible employees.

Compensation of an eligible employee is his fixed salary paid by the Corporation, plus any *cash* profit sharing distributions and adjusted compensation paid with respect to the fiscal year for which the contribution is being made. This compensation will not include overtime pay, reimbursement of expenses, finders' fees, suggestion awards, or similar payments. No units will be assigned with respect to annual compensation in excess of $18,000.

7. How Do I Share in the Plan?

A participant's share is expressed in "units." The value of the unit is subject to change since it is based on the total value of the Fund at the end of each month.

At the end of each year for which a contribution is made, a number of units will be assigned to you. The quantity assigned depends upon your "compensation" for that year.

There is one other means by which you acquire units—namely, the reallocation of units that have been forfeited by participants whose employment terminated during the year. At the end of each fiscal year, the forfeited units are redistributed among those participants who were included in the Plan at the time of such forfeiture, and who continue as participants when such redistribution is made. Reallocation is based upon each Plan member's participating interest in the Trust Fund.

8. What Happens to the Units After They Are Assigned?

Units assigned to you are put into your individual profit sharing account. Your units will remain in your account until paid out by reason of withdrawal, termination, death or retirement. The conditions and terms of such payments are treated in subsequent questions.

9. Are There Different Kinds of Units?

There are several different types of units. Roughly speaking, they can be categorized as those that belong to you even if you should leave ML; those that do not belong to you and which you must forfeit if you leave the firm; and those you may withdraw while still employed. There are, of course, technical names for each of the six varieties of units into which the broad classifications above are further divided. Each type, and how it is acquired, is explained in the answer to the next question.

It must be remembered, however, that any payment from the Profit Sharing Fund is limited by the provisions of Article 11 of the Plan.

10. What Kind of Units Will I Have?

That depends upon when you begin to participate in the Plan. If your first year of participation is 1961 or later, 30%

of the total units assigned to you will be classified as Vested Units after the completion of 3 full fiscal years of employment and further units, up to a 90% maximum will become *Vested* as the number of years of participation required by the Plan are completed . . . meaning that if you leave ML's employ, the money represented by those units is payable to you.

However, even though *Vested* units are payable to you when you leave ML, you may not have the use of them during employment until you have completed 10 full, fiscal years of service, or have completed five years of participation in the Plan, whichever is later. At that time, and each year thereafter, a portion of your *Vested* units will become *Payable*. *Payable* means that units designated as such may be withdrawn by the participant, while he is employed, if the application for withdrawal is approved by the Plan's Administrative Committee.

All units credited for years prior to 1961 were known as Deferred units at the time of assignment. They remained so classified until the completion of ten full, fiscal years of service. After the ten years, and each year thereafter, a portion of the Deferred units became *Payable* units. If they became *Payable* before 1957, they were known as unrestricted, i.e., withdrawable upon request. Units becoming *Payable* after 1957 were restricted . . . withdrawable only with the approval of the Plan's Administrative Committee.

The provisions of the Plan before it was amended concerning certain special characteristics of the units assigned through 1960 will continue to apply.

11. A Reminder About Taxes

Aside from the advantage to you of allowing your Units to accumulate until retirement, if you should have to withdraw any of your Units because of an emergency, you would want to consider the tax aspect of such a withdrawal. Briefly, under the United States Internal Revenue Code Regulations, any amount withdrawn during employment is

reportable as ordinary income received during the year of withdrawal.

Payment made upon retirement or other termination of employment—if made in a lump sum—is reportable as a long-term capital gain for Federal tax purposes.

12. What Happens If I Leave the Corporation?

Subject to any qualifying provisions of the Plan, if you should leave the employment of the Corporation for any reason, exclusive of death, retirement, or transfer to a subsidiary, you will receive the value of *all* your Payable Units, *all* your Vested Units, and, if you have any, a *percentage* of your Deferred Units.

The percentage of the Deferred Units you will receive is as follows:

Years of Employment	*Percent Payable*
1-4	50%
5	55
6	60
7	65
8	70
9	75
10 or more	80

Reminder: Deferred Units can only be those Units for the years through December 30, 1960.

13. If I Leave the Corporation When Will I Get My Money?

Within six months of your severance of employment from the Corporation (resignation or release), the Committee will authorize that a distribution be made to you either in a lump sum or installments.

14. In the Event of My Death What Happens to My Share?

Each participant, at the time he becomes a member of the Plan, is required to designate a beneficiary, on a form prescribed and furnished by the Committee. This beneficiary must be acceptable to the Committee and upon death of

a participant, the beneficiary will receive the value of all the Units standing to the participant's credit.

15. At Retirement How Is My Share Handled?

Upon retirement, the Committee will direct that you receive the value of all types of units credited to you. Payment will be made in a lump sum or in installments, at the discretion of the Committee.

16. Can Benefits Be Forfeited?

Yes, benefits under the Plan can be forfeited for the following reasons:

(1) Anyone who voluntarily terminates his employment or provokes his termination and engages in any occupation deemed by the Committee to be competitive with the Corporation or any subsidiary, forfeits all rights to Units credited for fiscal years after December 30, 1960.

(2) If it is determined by the Committee that dishonesty on the part of a participant in connection with the business and affairs of the Corporation occurred during his employment with the Corporation, that he flagrantly and willfully violated the rules or regulations of any exchange, association, or government body having regulatory powers over the Corporation's conduct of business, or that he flagrantly neglected his duties, he forfeits all rights to units credited to him subsequent to December 30, 1960. The approval and consent of the Board of Directors of the Corporation is required for the imposition of forfeitures pursuant to this provision.

Any difference between the Official Plan and the simplified explanations that we have attempted to present through these questions and answers shall of course be governed by the Plan.

PROVISIONS OF PROFIT SHARING PLAN FOR EMPLOYEES (Other than in Canada) MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED

As amended through May 17, 1966

ARTICLE 1

Administrative Committee

1.1 The Corporation shall appoint a Committee of not less than five (5) nor more than nine (9) members to be known as the Administrative Committee (herein called the "Committee") which shall serve at the pleasure of the Corporation. The members of the Committee may but need not be employees of the Corporation. Vacancies in the Committee arising by resignation, death, removal or otherwise, shall be filled by the Corporation.

1.2 The Committee shall administer the Plan and is authorized to make such rules and regulations as it may deem necessary to carry out the provisions of the Plan. The Committee shall determine any questions arising in the administration, interpretation and application of the Plan, which determination shall be conclusive and binding on all persons.

1.3 The Committee shall have the sole power to control the investment and the reinvestment of the Trust Fund and shall direct the Trustees or such agents or custodians as shall be designated by the Trustees with respect to the exercise or non-exercise of any or all of the powers of investment conferred upon the Trustees by the Trust Agreement.

1.4 The Committee shall appoint a Chairman from among its members and a Secretary who need not be a member. The committee shall act by a majority of its members at the time in office (even though less than five (5) in

number) and such action may be taken either by a vote at a meeting or in writing without a meeting. The Committee may by such majority action authorize any two or more of its members to execute any document or documents on behalf of the Committee, in which event the Committee shall notify the Trustees in writing of such action and the names of its members so designated and the Trustees thereafter shall accept and rely upon any document executed by such members as representing action by the Committee until the Committee shall file with the Trustees a written revocation of such designation.

1.5 The Committee may appoint such agents, who need not be members of such Committee, as it may deem necessary for the effective performance of its duties and may delegate to such agents such powers and duties as the Committee may deem expedient or appropriate. The compensation, if any, of such agents shall be fixed by the Committee within limits set by the Corporation.

1.6 The acts and determinations of the Committee shall be duly recorded by the Secretary thereof. Such records, together with any documents as may be necessary for the administration of the Plan, shall be preserved in the custody of such Secretary.

1.7 The members of the Committee shall serve without compensation for services as such but all expenses of the Committee shall be paid by the Corporation. Such expenses shall include any expenses incident to the functioning of the Committee, including, but not limited to, fees of investment counsel, compensation of its agents, attorney's fees, accounting charges and other costs of administering the Plan. All disbursements by the Trustees, except for the ordinary expenses of the administration of the Trust, shall be made upon the written instruction of the Committee.

1.8 The members of the Committee, and each of them, shall be free from all liability, joint or several, for their acts, omissions and conduct, and for the acts, omissions and conduct of their duly constituted agents in the administration of the Plan herein embodied, and the Corporation shall indemnify and save them, and each of them, harmless from the effects and consequences of their acts, omissions and conduct in their official capacity, except to the extent that such effects and consequences shall result from their own willful misconduct.

ARTICLE 2

Contributions

2.1 All contributions under the Plan shall be made by the Corporation and no contributions shall be required or permitted of any employees.

2.2 The contributions of the Corporation under the Plan for each fiscal year of the Corporation shall be determined in the following manner:

(a) the net profits of the Corporation shall be determined for such fiscal year;

(b) the "Contribution Base" for such fiscal year shall be ascertained by applying the following table:

If the Net Profits Are:	*The Contribution Shall Be:*
Not over $2,000,000	8% of the Net Profits
Over $2,000,000 but not over $3,000,000	$160,000 plus 8½% of the excess over $2,000,000
Over $3,000,000 but not over $4,000,000	$245,000 plus 9% of the excess over $3,000,000
Over $4,000,000 but not over $5,000,000	$335,000 plus 9½% of the excess over $4,000,000
Over $5,000,000 but not over $6,000,000	$430,000 plus 10% of the excess over $5,000,000
Over $6,000,000 but not over $7,000,000	$530,000 plus 10½% of the excess over $6,000,000
Over $7,000,000 but not over $8,000,000	$635,000 plus 11% of the excess over $7,000,000
Over $8,000,000 but not over $9,000,000	$745,000 plus 11½% of the excess over $8,000,000
Over $9,000,000	$860,000 plus 12% of the excess over $9,000,000

(c) a contribution Ratio shall be expressed by a fraction in which the numerator shall be the aggregate of all compensation (as defined in Section 4.5) paid or accrued by the Corporation with respect to such fiscal year to all participants in the Plan who are regularly employed other than in Canada at the end of such fiscal year, and the denominator shall be the total of the compensation paid or accrued by the Corporation with respect to such fiscal year to all such employees of the Corporation and to all employees of the Corporation participating in the Canadian Plan.

(d) the contribution of the Corporation under this Plan for such fiscal year shall be calculated by multiplying the Contribution Ratio determined under subclause (c) hereof by the Contribution Base determined under subclause (b) hereof.

The contribution by the Corporation determined as aforesaid will be paid by the Corporation to the Trustees to be held and administered in trust pursuant to the terms of the Plan and Trust Agreement. In no event, however, shall such contribution for any fiscal year exceed the amount allowable for such fiscal year under Section 404(a) (3) and (7) of the Internal Revenue Code of 1954, as amended, after giving effect to the credit and carry-over provisions of the Code, or under any statute of similar import enacted in lieu thereof.

2.3 As used herein the term "net profits" of the Corporation shall mean its net income or profits determined by the Corporation in accordance with generally accepted accounting principles and practices, adjusted as follows:

(a) No deduction shall be allowed for taxes based on income imposed by the United States.

(b) No deduction shall be allowed for the contributions to this Plan or to the Canadian Plan.

(c) No deduction shall be allowed for dividends paid on the stock of the Corporation.

(d) A deduction shall be allowed for an amount equal to 6 percent of the aggregate amount of capital. The aggregate amount of capital shall consist of the average outstanding capital stock for the fiscal year, the average paid-in surplus for the fiscal year, and the earned surplus at the beginning of the fiscal year.

(e) A deduction shall be allowed for the full amount of the contributions made to the Pension Plan of the Corporation.

(f) A deduction shall be allowed for an amount equal to dividends received from subsidiaries.

In determining the amount of the contribution to be made for any fiscal year, the Corporation shall be entitled to rely on a computation of Net Profits and of the amounts contributable for such year prepared by independent public accountants on the basis of the Corporation's records prior to the time prescribed by law for filing the federal income tax return for such year, including extensions thereof. The Corporation's determination of such contributions shall be binding on all persons, including the Trustees, the Committee and the participants and their beneficiaries. Such determination shall be final and conclusive and shall not be subject to change as a result of adjustments made in a subsequent audit by the Internal Revenue Service, *provided, however,* that the Corporation may in its discretion take into consideration all or any part of such adjustments in determining the amount of any contributions made in succeeding calendar years.

2.4 As used, the terms "fiscal year" and "year" shall mean the fiscal year of the Corporation as at the time in effect, including a calendar year, a fiscal year other than a calendar year, or a fiscal year of less than twelve (12) months' duration.

ARTICLE 3

Employees Eligible to Participate

3.1 Every employee (except those employees normally employed less than thirty (30) hours per week and those employees paid on a daily or hourly basis), who:

(a) has been continuously employed by the Corporation (or by any other employer whose business, or any part thereof, is absorbed by the Corporation, or by any predecessor of such employer and which is designated by the Corporation as an employer to which this provision shall apply) during an entire fiscal year for which a contribution is being made by the Corporation; and

(b) was employed by the Corporation in the United States at the end of such fiscal year; and

(c) has within thirty (30) days after receiving from the Committee notice of his eligibility, communicated in writing to the Committee his acceptance of participation hereunder upon the terms and conditions of this Plan, shall be eligible to participate in such contribution.

3.2 Such eligible employees shall be determined by the Committee from the Corporation's records and the Committee's determination thereof shall be conclusive and binding upon all persons.

ARTICLE 4

Crediting of Contributions

4.1 As of the end of each fiscal year for which the Corporation shall make a contribution, each employee who is eligible at such time shall be credited by the Committee with the percentage of such contribution (expressed in whole Units of equal value) which his compensation from the Corporation for the fiscal year represents of the total compensation from the Corporation of all eligible employees for such fiscal year.

4.2 For the purpose of crediting the contribution of the fiscal year ended December 31, 1945, the value of each Unit shall be $1, and for each subsequent fiscal year's contribution, the value of such Unit shall be the amount resulting from the division of the total number of outstanding Units at the end of such fiscal year into the then value of the Trust Fund (excluding the contribution for such fiscal year). In so crediting the eligible employees, the Committee shall disregard fractions of a Unit.

4.3 The "value" of the Trust Fund shall be the fair market value of the net assets held under the Trust (including all profits and increments of any nature whatsoever) determined by the Committee as of the last Friday in December of each year and at such other time or times as to it shall seem advisable, and such determination shall be conclusive and binding upon all persons.

4.4 For the purpose of making distributions the "value" of a Unit shall be its value as determined by the Committee at such time or times as to it seems proper by dividing the total number of outstanding Units at the time of such determination into the most recent or then value of the Trust Fund as determined by the Committee under Section 4.3. Such determination of the value of a Unit shall be conclusive and binding upon all persons.

4.5 The "compensation" of an eligible employee shall be his fixed salary paid by the Corporation during the year for which the contribution is being made plus any cash profit sharing distributions and adjusted compensation paid with respect to such year but shall not include overtime pay, reimbursement for expenses, finder's fees, suggestion awards, deferred profit sharing distributions or similar payments. Notwithstanding the foregoing, the "compensation" of any employee for any fiscal year shall not exceed

a total of $18,000. The determination by the Corporation of compensation and aggregate compensation of employees shall be conclusive upon all persons.

4.6 Every eligible employee who has been credited with Units hereunder shall be known as a "participant" and as soon as practicable after each such credit, shall be informed in writing by the Committee of the number and value of the Units then standing to his credit.

4.7 Units, the value of which has been distributed to participants, shall be canceled. Units forfeited by participants shall be reallocated as of the end of the fiscal year among continuing participants of the previous year who are then regularly employed by the Corporation in the United States in proportion to their interests in the Trust Fund.

ARTICLE 5

Classification of Units—Vesting

5.1 *With Respect to Units Credited for Fiscal Years up to and Including the Year Ended December 30, 1960:*

(a) Units credited to a participant as of the end of each fiscal year shall be classified as "Deferred Units" and shall become and be reclassified as "Payable Units" as follows, disregarding fractions of a Unit:

(i) ONE-HALF of the number of Deferred Units standing to the credit of a participant shall become Payable Units as of the March 1 following either:

A. The completion by him of ten (10) full fiscal years of employment; or

B. The completion by him of five (5) full fiscal years of participation in the Plan,

whichever is later, and thereafter

(ii) If the first reclassification of Units on behalf of a participant occurred prior to 1961:

A. ONE-SIXTH of the Deferred Units standing to his credit on March 1, 1961 shall become Payable Units on March 1, 1961, and

B. ONE-SIXTH of the number of Deferred Units standing to his credit on each succeeding March 1st shall then become Payable Units.

(iii) If the first reclassification of Units on behalf of a participant occurs in 1961 or later, ONE-SIXTH of the Deferred Units standing to his credit on each March 1st following the reclassification shall then become Payable Units.

5.2 *With Respect to Units Credited for Fiscal Years Subsequent to the Year Ended December 30, 1960:*

(a) A participant shall have no vested rights in Units credited after the fiscal year ended December 30, 1960 unless and until he has completed three years of continuous employment. Thereafter, and until completion of five years of continuous employment he shall have a vested right in 30% of such Units allocated to his account. Upon the completion of each succeeding year after 1960 and after five years of continuous employment, such previously credited Units shall vest at the rate of an additional 10% each year up to a maximum of 90%. After completion of five years of continuous employment the new Units credited for each separate year thereafter shall vest at 30% immediately and each succeeding year an additional 10% vesting

shall be added to the Units which were vested at 30%, until the vesting in a year's Units has reached 90%.

(b) Vested Units shall become and be reclassified as "Payable Units" as follows, disregarding fractions of a Unit:

(i) If the first reclassification of Units on behalf of a participant occurs in 1961 or later:

A. ONE-HALF of the number of Vested Units standing to his credit shall become Payable Vested Units as of the March 1st following either:

a. The completion by him of ten (10) full fiscal years of employment, or

b. The completion by him of five (5) full fiscal years of participation in the Plan,

whichever is later, and thereafter

B. ONE-SIXTH of the Non-Payable Vested Units standing to his credit on each succeeding March 1st shall then become Payable Vested Units.

(ii) If the first reclassification of Units on behalf of a participant occurred prior to 1961:

A. ONE-SIXTH of the Vested Units standing to his credit on March 1, 1962 shall become Payable Vested Units, and

B. ONE-SIXTH of the Non-Payable Vested Units standing to his credit on each succeeding March 1st shall then become Payable Vested Units.

(c) "Employment" shall mean the period of uninterrupted service of the employee after April 1, 1940 as an employee of the Corporation or of any subsidiary or of any other employer whose busi-

ness, or any part thereof, is heretofore or hereafter absorbed by the Corporation, or of any predecessor of such employer and which is designated by the Corporation as an employer to which this provision shall apply.

ARTICLE 6

Distributions During Employment

6.1 *Units Becoming Payable Units on or before May 1, 1956.*

(a) Within ninety (90) days of the receipt by the Committee of a request from a participant, the Committee shall direct the Trustees or such custodians or agents as shall be designated by the Trustees to distribute to such participant the then value of such number of Units which became Payable Units on or before May 1, 1956 as the participant shall have requested.

6.2 *Units Becoming Payable Units After May 1, 1956.*

(a) No Participant shall have the uncontrolled right to withdraw any Units which became or will become Payable Units after May 1, 1956. However, the committee may, at its sole discretion (but with due regard for the requirements of Section 401(a) of the Internal Revenue Code of 1954, as amended) upon request of a participant, permit a withdrawal of such Payable Units when it appears to the Committee, on the basis of the participant's representations or otherwise that he is in need of and intends to use the amount of such Payable Units to acquire, provide or maintain residential property for himself and his family; to defray ordinary living expenses of himself and his family, includ-

ing costs of education, medical and dental care, taxes and insurance, or for any other purpose which the Committee may determine to be of an emergency character. The Committee shall take action on each such request within ninety (90) days after the receipt thereof; and, if it determines to permit such withdrawal, it shall forthwith direct the Trustees or such custodians or agents as shall be designated by the Trustees to distribute the then value of such Payable Units as the participant shall have requested.

ARTICLE 7

Distributions Upon Severance of Employment

7.1 Upon severance of a participant's employment [other than by reason of death, retirement, or transfer to the employment of any subsidiary of the Corporation or any subsidiary thereof (herein called "Subsidiary")], the Committee shall within six months of such severance, direct the Trustees or such custodians or agents as shall be designated by the Trustees to pay to such participant, in a lump sum or in installments, in cash or in kind, all in the sole discretion of the Committee, the following amounts:

(a) The value of all Payable Units standing to his credit as of the date of his severance of employment plus, if such severance of employment takes place between the end of any fiscal year and the succeeding March 1, inclusive, the value of the number of Units which would otherwise become Payable Units on such succeeding March 1, and

(b) The value of the following:

(i) *With respect to Units Credited for Fiscal Years up to and Including the Year Ended December 30, 1960:*

The applicable following percentage of the Deferred Units standing to his credit as of the date of his severance of employment:
50% after completion of the first full fiscal year of employment;
55% after completion of the fifth full fiscal year of employment;
60% after completion of the sixth full fiscal year of employment;
65% after completion of the seventh full fiscal year of employment;
70% after completion of the eighth full fiscal year of employment;
75% after completion of the ninth full fiscal year of employment; and 80% after completion of the tenth full fiscal year of employment and every fiscal year thereafter.

(ii) *With Respect to Units Credited for Fiscal Years Subsequent to the Year Ended December 30, 1960:*
The Units standing to his credit as of the date of his severance of employment in which his rights have vested.

ARTICLE 8

Distributions Upon Death

8.1 In the event of the death of a Participant, former Participant or retired Participant, the Committee shall direct the Trustees or such custodians or agents as shall be designated by the Trustee to distribute the then value of all Units standing to his credit (whether Payable or Deferred, Vested, or Unvested) to his designated beneficiary or beneficiaries. Each Participant, former Participant, or re-

tired Participant shall designate in writing on a form prescribed and furnished by the Committee a beneficiary or beneficiaries acceptable to the Committee. In the absence of an effective designation, the Committee is authorized to make payment to a beneficiary or beneficiaries selected by the Committee from among the natural objects of the Participant's bounty, his dependents or his estate. Any determination so made by the Committee shall be binding and conclusive upon all members of the above-described classes and upon the estate of the Participant, former Participant, or retired Participant.

ARTICLE 9

Distributions Upon Retirement

9.1 The normal retirement date of a participant shall be the first day of the month coincident with or next following his 65th birthday.

9.2 A participant may elect to postpone his retirement until the end of the calendar year of his 65th birthday without the consent of the Corporation. Continuation of employment beyond such time shall be only at the request of the Corporation and only on a year to year basis but not beyond the first day of the month coincident with or next following his 70th birthday or January 1, 1962, whichever is later. A participant whose retirement is postponed shall continue to participate in the Plan and shall become fully vested in his normal retirement date in all Units credited to his account then or thereafter.

9.3 A participant may be retired for the purposes hereof prior to attaining his normal retirement date upon becoming totally and permanently disabled or for such other reasons as may be determined by the Corporation to be a basis for retirement.

9.4 Upon the retirement of a participant, the Committee shall direct the Trustees or such custodians or agents as shall be designated by the Trustees to distribute to such participant the then value of all the Units standing to his credit (whether Payable or Deferred, Vested or Unvested) in a lump sum or installments, in cash or in kind, all in the sole discretion of the Committee.

ARTICLE 10

Transfers to and from Subsidiaries

10.1 In the event that:

(a) a participant shall terminate employment with the Corporation by reason of transfer to the employment of any subsidiary of the Corporation or any subsidiary thereof (herein called "Subsidiary"), or

(b) a participant shall be employed by the Corporation in Canada.

The Units then standing to his credit (whether Payable or Deferred, Vested or Unvested) shall remain credited to his account. Upon termination of continuous employment with the Corporation or a Subsidiary, the Units then standing to his credit shall be paid out to him in accordance with the provisions of the Plan pertaining to Death, Retirement and Terminations, whichever is applicable. During such periods of employment with a Subsidiary or with the Corporation in Canada:

1. No contributions shall be made on behalf of any participant but such periods of employment shall be included for the purposes of computing years of employment required for withdrawal privileges and the attainment of vested rights.

2. The Units standing to the participant's account shall share in the profits and losses of the Trust Fund but shall not reflect contributions which are made by the Corporation or forfeitures which occur during any such period.
3. Such Units may be withdrawn by the participant in accordance with the provisions of Article 6.

10.2 A period of uninterrupted employment with a Subsidiary or with the Corporation in Canada, which is immediately followed by employment with the Corporation other than in Canada, shall be included for the purposes of computing years of employment required for eligibility to participate in the Plan, withdrawal privileges and the attainment of vested rights.

ARTICLE 11

Forfeiture of Benefits

11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960.

11.2 In the event that at any time it is determined by the Committee that dishonesty in connection with the business and affairs of the Corporation on the part of a participant occurred during the participant's employment with the

Corporation or that a participant flagrantly and willfully violated the rules or regulations of any securities or commodities exchange, the National Association of Securities Dealers, the Securities & Exchange Commission, the Commodity Exchange Administration, or any other Governmental body having regulatory powers over the Corporation's conduct of business, such participant shall forfeit all rights to any benefits due or to become due to him from the Trust Fund with respect to units credited for fiscal years subsequent to the year ended December 30, 1960. In the event that a participant is guilty of such flagrant, willful negligence in the performance of his duties as to result in the termination of his employment or, in the case of a participant no longer employed, would have resulted in termination of his employment, such participant shall forfeit all rights to any benefits due or to become due to him from the Trust Fund with respect to units credited for fiscal years subsequent to the year ended December 30, 1960. The determination of the Committee shall be subject to review by, and shall require the approval and consent of, the Board of Directors of the Corporation.

ARTICLE 12

Trust Fund

12.1 The Corporation and the Trustees have entered into a Trust Agreement providing for the administration of the Trust Fund. Neither principal nor income of the Trust Fund shall be used for any purpose other than the exclusive benefit of participants or their beneficiaries. The Trust Agreement forms a part of this Plan and any and all rights and benefits which may accrue under this Plan shall be subject to all the terms and provisions of the Trust Agreement.

ARTICLE 13

Uniform Administration

13.1 Whenever, in the administration of the Plan, any action is required by the Corporation or the Committee, including, but not by way of limitation, action with respect to eligibility or classification of employees, contributions or benefits, such action shall be uniform in nature as applied to all persons similarly situated and no such action shall be taken which will discriminate in favor of participants who are officers, shareholders or persons whose principal duties consist of supervising the work of others, or highly compensated participants.

ARTICLE 14

Abandonment of Interest

14.1 It shall be the duty of each participant whose employment has terminated and who is entitled to benefits hereunder to keep the Committee advised of his mailing address. If the Committee shall be unable, within one year after any benefit becomes due from the Trust Fund to a participant, to make payment because the Committee has not been notified of the identity or whereabouts of such person, the Committee may direct that such benefit and all future benefits with respect to such person shall be forfeited and all liability for the payment thereof shall terminate.

ARTICLE 15

Payment Due An Incompetent

15.1 If the Committee determines that any person to whom a payment is due hereunder is incompetent by reason of physical or mental disability, the Committee shall have power to cause the payments becoming due to such person

to be made to another for the benefit of the incompetent, without responsibility of the Committee or the Trustees to see the application of such payment. Payments made pursuant to such power shall operate as a complete discharge of the Committee, the Trustees and the Trust Fund.

ARTICLE 16

Inalienability of Benefits

16.1 Benefits from the Trust Fund may not be assigned or hypothecated and, to the extent permitted by law, no such benefit shall be subject to legal process or attachment for the payment of any claim against any person entitled to receive it.

ARTICLE 17

Source of Payments

17.1 Benefits payable under the Plan shall be paid or provided solely from the Trust Fund and the Corporation assumes no liability or responsibility therefor. Its obligation is limited solely to making contributions to the Trust Fund as provided in the Plan.

ARTICLE 18

Plan Not a Condition of Employment

18.1 The adoption and maintenance of the Plan shall not be deemed to constitute a contract between the Corporation and any employee or participant, or to be consideration for, or an inducement or condition of, the employment of any person. Nothing herein contained shall be deemed to give any employee or participant the right to be retained in the employ of the Corporation or to interfere with the right of the Corporation to discharge any employee or participant at any time.

ARTICLE 19

Amendment of Plan

19.1 Except as herein provided, the Corporation reserves the right to modify, alter or amend the Plan hereunder at any time and from time to time to any extent that it may deem advisable. Such amendment shall be set out in an instrument in writing duly executed on behalf of the Corporation. No such amendment shall increase the duties or responsibilities of the Trustees without their consent thereto in writing. No such amendment shall have the effect of revesting in the Corporation the whole or any part of the principal or income of the Trust Fund or of diverting any part of such principal or income to purposes other than for the exclusive benefit of the participants or their beneficiaries. No such amendment shall diminish the rights of any participant, whether vested or contingent, subject to the provisions of ARTICLE 11, with respect to contributions made prior to the date of such amendment.

ARTICLE 20

Termination of Plan

20.1 The Plan is purely voluntary on the part of the Corporation and the Corporation reserves the right to terminate the Plan and to discontinue contributions hereunder at any time. If contributions are discontinued, the rights of the then Participants in contributions theretofore made shall fully vest. If the Plan is terminated, the rights of all then Participants shall fully vest. Upon termination of the Trust the Committee shall direct the Trustees to distribute all assets remaining in the Trust Fund, after payment of any expenses properly chargeable against the Trust Fund, to the Participants in accordance with the value of the Units credited to such Participants as of the

date of such termination, in cash or in kind, and in such manner as the Committee shall in its sole discretion determine. The Committee's determination shall be conclusive upon all persons.

ARTICLE 21

Adoption of Plan by Successor Company

21.1 A successor to the business of the Corporation by whatever form or manner resulting may continue and adopt the Plan by an instrument in writing executed by such successor and by the Corporation. Such successor shall succeed to all the rights, powers and duties hereunder of the Corporation. The employment of any employee who is continued in the employ of such successor shall not be deemed to have been terminated or severed for any purpose hereunder.

ARTICLE 22

Construction of Plan

22.1 The validity of the Plan or of any of the provisions thereof shall be determined under and shall be construed according to the laws of the State of New York.

22.2 Titles to articles and headings are for general information only and the Plan is not to be construed by reference thereto.

22.3 Wherever any words are used in the masculine gender they shall be construed as though they were also used in the feminine gender in all cases where they would so apply, and wherever any words are used in the singular form, they shall be construed as though they were also used in the plural form in all cases where they would so apply.

ARTICLE 23

Preservation of Benefits

23.1 The Corporation intends to preserve the benefits accrued to employees in Canada under this Plan in respect of services performed by them in Canada as fully and to the same extent as if the said employees had remained participants in this Plan. To this end, and as soon as practicable after the effective date of the Canadian Plan and receipt of rulings requested from the Department of National Revenue in Canada and the Treasury Department of the United States with respect to qualification of the Canadian Plan and the maintenance of qualification of this Plan, the Committee shall direct the Trustees of the Trust Fund established under this Plan to transfer and pay to the Trustee under the Canadian Plan an amount equal to the aggregate of the accrued interests of such employees in the Trust Fund as of the date of such payment in respect of services rendered or performed by such employees in Canada. Coincident with such payment, said Committee will cause to be delivered to the Trustee under the Canadian Plan and to the Committee administering the Canadian Plan a statement of the individual interests of all such employees in the said aggregate amount setting forth separately for each employee:

(a) the interests credited under this Plan for fiscal years up to and including the year ended December 30, 1960;

(b) the interests credited under this Plan for the fiscal year subsequent to the year ended December 30, 1960;

(c) the interests which became "payable units" (within the meaning of this Plan).

DEFENDANT'S ANSWER TO COMPLAINT

Filed April 17, 1970

Superior Court, City and County of San Francisco

[Caption omitted in printing]

Defendant MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., for its answer to the complaint on file herein, admits, denies and alleges as follows:

* * *

7. Answering the allegations of paragraphs IX and X, it admits that on or about July 14, 1958, it entered into an oral contract of employment with plaintiff David Ware under which plaintiff was to render services as an account executive at its offices in the City and County of San Francisco, State of California; except as so admitted it denies specifically and generally the allegations contained in paragraphs IX and X, and in that connection alleges that it performed all of its duties and obligations under said employment contract.

8. Answering the allegations of paragraphs XI and XII, it admits that during the period of plaintiff David Ware's employment, there was allocated to his account in the Profit Sharing Plan certain numbers of "units" representing his share of the Profit Sharing Plan trust, a New York trust; it further admits that upon termination of employment by plaintiff David Ware, there were 2497 vested units and 1895 unvested units allocated to his account under the provisions of Article 5 of the Profit Sharing Plan; it further admits that on or about March 17, 1969, plaintiff David Ware voluntarily terminated his employment with defendant; it is informed and believes, and on such basis admits, that other alleged plaintiff members of the class had allocated to their Profit Sharing Plan accounts during their respective periods of employment certain

numbers of "units" representing their respective shares of the Profit Sharing Plan trust in accordance with the terms and provisions of the Plan; except as so admitted, it denies specifically and generally the allegations contained in said paragraphs and in that connection alleges that except as set forth in paragraph 3 it has no information or belief concerning the specific identities of the other alleged plaintiff members of the class and on that basis denies specifically and generally the allegations with respect thereto; it further alleges that plaintiff David Ware voluntarily terminated his employment and entered into competitive employment with defendant thereby invoking the provisions of Article 11.1 of the Profit Sharing Plan and that, pursuant to said Article 11.1, the Administrative Committee determined, on or about April 18, 1969, that plaintiff David Ware had forfeited all rights to any benefits otherwise due or to become due him from the trust fund of said Profit Sharing Plan because of such competitive employment; it further alleges that it is informed and believes and on that basis alleges that all other alleged plaintiff members of the class voluntarily terminated their employment and entered into competitive employment with defendant at various times thereby invoking the provisions of Article 11.1 of the Profit Sharing Plan pursuant to which the said Administrative Committee made determinations that each had forfeited all rights to any benefits otherwise due or to become due them from the trust fund of said Profit Sharing Plan because of such competitive employment.

• • •

11. Answering the allegations of paragraphs XV and XVI, it admits that it contends that pursuant to a determination of the Administrative Committee of said Profit Sharing Plan under Article 11.1 of said Plan, plaintiff

David Ware forfeited all rights to the benefits otherwise due or to become due him from the trust fund by reason of the fact that said plaintiff David Ware entered into competitive employment with defendant Merrill Lynch; that it is informed and believes that all other alleged plaintiff members of the class also forfeited all rights to the benefits otherwise due or to become due each of them from the trust fund by reason of the fact that a determination was made as to each by the Administrative Committee of said Profit Sharing Plan pursuant to Article 11.1 of said Plan that each engaged in competitive employment with defendant upon termination of their respective employment with defendant; that the provisions of Article 11.i of said Plan are a reasonable restraint on competition under the laws of California or New York or any other state or the United States; that pursuant to Article 22.1, said Plan is to be construed according to the laws of the State of New York, under which Article 11.1 is lawful, valid, and enforceable; that the plan is not part of the contract of employment; and such other contentions set forth as affirmative defenses herein; except as so admitted, it denies specifically and generally the allegations contained in said paragraph.

• • •

THIRD AFFIRMATIVE DEFENSE

14. For a third affirmative defense it alleges that one of the conditions precedent to plaintiff David Ware's employment with defendant Merrill Lynch was the approval of said employment with the New York Stock Exchange; that defendant Merrill Lynch is a "member" of the New York Stock Exchange; that on or about September 26, 1958, plaintiff David Ware executed a written application for the approval of his employment as a registered representative with defendant Merrill Lynch on form RE-1

of the New York Stock Exchange, a copy of said form of which is attached hereto as Exhibit 1 and incorporated herewith; that pursuant to paragraph 30(j) of said application, plaintiff David Ware agreed that any controversy between him and any member arising out of his employment or the termination of his employment by and with such member shall be settled by arbitration at the instance of any such party in accordance with the constitution and rules then obtaining of the New York Stock Exchange; that said application was approved by the New York Stock Exchange; that plaintiff David Ware's sole remedy under the above clause set forth was and is the arbitration of any alleged dispute between him and defendant Merrill Lynch; that defendant Merrill Lynch is informed and believes, and on such basis alleges, that no demand for arbitration has been made by plaintiff David Ware to the New York Stock Exchange; it further alleges that no demand for arbitration has been made by plaintiff David Ware upon defendant Merrill Lynch; that defendant Merrill Lynch has performed all of the obligations and duties to be performed on its part under the employment contract with plaintiff David Ware and elects that the said matters in controversy be submitted to arbitration and arbitrated in accordance with the provisions of said contract; defendant is informed and believes, and on such basis alleges, that each and every other alleged plaintiff member of the class also agreed to submit any controversy to arbitration pursuant to the same said paragraph of the same said New York Stock Exchange form; that no other plaintiff member of the class has made demand upon defendant and/or the New York Stock Exchange for arbitration; and defendant elects that any and all said matters be submitted to arbitration and arbitrated in accordance with the provisions of said contract and contracts.

* * *

SIXTH AFFIRMATIVE DEFENSE

18. For a sixth affirmative defense, defendant Merrill Lynch alleges that the provisions of Article 11.1 of said Profit Sharing Plan constitute a lawful and reasonable restraint on competition.

SEVENTH AFFIRMATIVE DEFENSE

19. For a seventh affirmative defense, defendant Merrill Lynch alleges that pursuant to the provisions of Article 22.1 of said Profit Sharing Plan, said Plan is to be construed according to the laws of the State of New York; and further alleges that the provisions of Article 11.1 are lawful under the laws of the State of New York and constitute a reasonable, lawful, and valid restraint on competition.

EIGHTH AFFIRMATIVE DEFENSE

20. For an eighth affirmative defense defendant alleges that it is engaged in a world-wide securities business, doing business in all of the states of the United States and numerous foreign countries; that substantially all of its employees are eligible to and do participate in said Profit Sharing Plan; that said Profit Sharing Plan is operated as a trust with the trust residence located in the State of New York where it is administered; that said Profit Sharing Plan is administered uniformly and without discrimination as to the participants therein wherever they may be employed by defendants; that said Profit Sharing Plan is to be administered and construed in accordance with the laws of the State of New York; that Article 11.1 has been construed by the Court of Appeal of the State of New York as a valid, lawful and reasonable restraint on competition; that provisions similar to Article 11.1 have

been construed by the highest courts of other states to be valid, lawful and reasonable restraint on competition; that said Profit Sharing Plan grants defendant the right to substantial taxation and other benefits under the laws of the United States and other states; that any declaration by this court that Article 11.1 is invalid under the laws of California would cause defendant to discriminate in the administration of said Profit Sharing Plan in violation of the laws and Constitution of the United States and the laws and constitutions of the several states or cause defendant to delete said Article 11.1 from said Profit Sharing Plan thereby denying defendant due process of law under the laws and Constitution of the United States.

* * *

WHEREFORE, defendant prays

1. That this suit be dismissed with prejudice, or that all proceedings in this action be abated until a final determination in said other action;
2. For defendant's costs of suit herein; and
3. For such other and further relief as the court deems just and proper.

Dated: April 16, 1970.

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE

By /s/ W. REECE BADER
W. Reece Bader
Attorneys for Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.

(Jurat omitted in printing)
(Certificate of Service omitted in printing)
(Exhibits omitted in printing)

DEFENDANT'S PETITION TO ORDER ARBITRATION

Filed April 17, 1970

Superior Court, City and County of San Francisco

[Caption omitted in Printing]

I

The petition of MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., respectfully shows:

Petitioner, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., is a corporation organized under the laws of the State of New York and authorized to do business in the State of California.

II

On or about July 14, 1958, petitioner and DAVID WARE, plaintiff in the above-entitled action, entered into a contract of employment whereby said DAVID WARE was to render services to petitioner in the capacity of an Account Executive.

III

On or about January 10, 1959, said DAVID WARE became eligible to participate in petitioner's Profit Sharing Plan, and made a written election to so participate. A copy of said Plan and information delivered to plaintiff prior to his election is attached hereto as Exhibit 1 and incorporated herein.

IV

At various times during the course of his employment, petitioner made contributions to said Plan which were credited to said DAVID WARE's account in said Plan.

V

On or about March 17, 1969, said DAVID WARE voluntarily terminated his employment with petitioner and entered into competitive employment.

VI

Article 11.1 of said Plan provides:

> "A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation . . . and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, . . . shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

VII

At the time of said DAVID WARE's voluntary termination of his employment, there were 2497 vested and 1895 unvested units credited to his account in the Trust Fund.

VIII

On or about April 18, 1969, the Administrative Committee determined that said DAVID WARE had voluntarily terminated his employment with petitioner; had entered into competitive employment; and had thereby forfeited any and all rights he had to benefits in said Plan.

IX

A condition precedent to employment of said DAVID WARE by petitioner was the approval of said employment by the New York Stock Exchange, of which petitioner is a member.

X

On or about September 26, 1958, said DAVID WARE executed a written application for approval of employment

on Form RE-1 of the New York Stock Exchange; said application was approved by the New York Stock Exchange, Department of Member Firms. A copy of said application is attached hereto as Exhibit 2 and incorporated herein.

XI

Paragraph 30(j) of said application states, as consideration for the approval of said employment with petitioner:

> "I agree that any controversy between me and any . . . member organization arising out of my employment on the termination of my employment by and with such . . . member organization shall be settled by arbitration at the instance of any such party in accordance with the Constitution and rules then obtaining of the New York Stock Exchange."

XII

A controversy has arisen under said agreement in that said DAVID WARE has filed a lawsuit seeking a declaration that Article 11.1 of petitioner's Profit Sharing Plan is invalid and unlawful and further seeking to compel petitioner to pay over to him the value of vested units to which he alleges he was entitled upon termination of his employment.

XIII

Petitioner alleges that on or about May 17, 1969, one Anthony Cameron, a former employee of petitioner, who was and is a member of the alleged class of plaintiffs herein, filed a claim with the Division of Labor Law Enforcement, Department of Labor, State of California, for wages against petitioner; said Cameron alleged in said claim that he was entitled to the value of his vested units in petitioner's Profit Sharing Plan, which is the subject of this action, and which had been forfeited pursuant to a

determination of the Administrative Committee of said Plan under Article 11.1 thereof that said Cameron had voluntarily terminated his employment with petitioner and entered into competitive employment; on or about July 3, 1969, the Division of Labor Law Enforcement, Department of Labor, State of California, dismissed said claim on the ground that it was subject to arbitration pursuant to a written arbitration agreement between petitioner and said Cameron; and that said arbitration agreement consisted of the same said New York Stock Exchange Form RE-1, paragraph 30(j) thereof, which had been executed by said Cameron on or about November 11, 1963. A copy of said notice of dismissal is attached hereto as Exhibit 3 and incorporated by reference herein.

XIV

Petitioner is informed and believes, and on such basis alleges, that each alleged plaintiff member of the class was employed by petitioner at various times and executed the same aforesaid RE-1 form whereby each agreed in writing to arbitrate any controversy between him and petitioner arising out of his employment; that each alleged plaintiff member of the class has refused and still refuses to submit said controversy to arbitration and that petition has stood and now stands ready and willing to submit all controversies to arbitration pursuant to the provisions of paragraph 30(j) of said form which each alleged plaintiff member of the class executed.

XV

Petitioner has performed all of its duties and obligations under said agreements and has stood and now stands willing and ready to submit the aforesaid controversy to ar-

bitration pursuant to the provisions of paragraph 30(j) of New York Stock Exchange Form RE-1. Said DAVID WARE has refused and still refuses to submit said controversy to arbitration.

WHEREFORE, petitioner prays that an order of this Court be made finding that a written agreement to arbitrate said controversy exists and directing that petitioner and said DAVID WARE arbitrate the aforesaid controversy existing between them in the manner provided for under said Form RE-1 and for such other and further relief as the Court finds proper.

Dated: April 16, 1970.

ORRICK, HERRINGTON, ROWLEY & SUTCLIFFE

By /s/ W. REECE BADER
W. Reece Bader

Attorneys for Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc.

[Jurat omitted in printing]
[Certificate of Service omitted in printing]
[Exhibit 1 omitted in printing]

EXHIBIT 2 TO DEFENDANT'S PETITION TO ORDER ARBITRATION
[Filed April 17, 1970]
FORM RE-1

* * *

NEW YORK STOCK EXCHANGE

DEPARTMENT OF MEMBER FIRMS
APPLICATION FOR APPROVAL OF EMPLOYMENT OF REGISTERED REPRESENTATIVE

* * *

1. WARE, DAVID J.
Last Name First Name Initial

2. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
To Be Employed By

3. REGISTERED REPRESENTATIVE
Title or Position

4. San Francisco, California
Where to be employed

* * *

30. . . . In consideration of the New York Stock Exchange's receiving and considering this application.

* * *

(d) I have read the Constitution and Rules of the Board of Governors of the New York Stock Exchange and, if approved, I hereby pledge myself to abide by the Constitution and Rules of the Board of Governors of the New York Stock Exchange as the same have been or shall be from time to time amended, and by all rules and regulations adopted pursuant to the Constitution, and by all practices of the Exchange.

Further, and in consideration of the New York Stock Exchange's approving this application, I submit myself to the jurisdiction of such Exchange, and I agree as follows:

* * *

(j) I agree that any controversy between me and any member or member organization arising out of my employment or the termination of my employment by and with such member or member organization shall be settled by arbitration at the instance of any such party in accordance with the Constitution and rules then obtaining of the New York Stock Exchange.

31. (Date) September 26, 1958

/s/ David J. Ware

* * *

ORDER DENYING PETITION TO COMPEL ARBITRATION

Filed June 9, 1970

(Caption omitted in printing)

June 8, 1970

PETITION TO COMPEL ARBITRATION, is denied MOTION FOR ORDER DETERMINING THAT ACTION IS MAINTAINABLE AS A CLASS ACTION AND FOR NOTICE TO ALL MEMBERS OF THE CLASS OF PENDENCY OF CLASS ACTION, is granted.

/s/ Robert W. Merrill
Judge of the Superior Court

OPINION AND DECREE OF THE COURT OF APPEAL

In the Court of Appeal of the State of California
First Appellate District, Division Four

Filed—Mar 15 1972

1 Civil 28875
(Sup.Ct.No. 612278)

David Ware, on behalf of himself and all others similarly situated,
Plaintiff and Respondent,
vs.
Merrill Lynch, Pierce, Fenner & Smith, Inc., a corporation,
Defendant and Appellant.

Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals, pursuant to Code of Civil Procedure section 1294, subdivision (a), from order denying petition to order arbitration.

Questions Presented

1. Was there an arbitration agreement?
2. Is the forfeiture provision of the arbitration agreement legal?
3. Does Labor Code section 229 prohibit arbitration in this dispute?

Record

Plaintiff, a former employee of Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch), on behalf of himself and other former employees similarly situated, filed this action for declaratory relief and damages. The gravamen of the complaint involves a provision, Article 11.1, in the Merrill Lynch Profit Sharing Plan for Employees. The complaint seeks (1) a declaration that Article 11.1 is invalid under applicable law (Bus. & Prof. Code, § 16600), and (2) that defendant is obligated to pay to plaintiff the amount of the profit sharing rights which Merrill Lynch claims were forfeited and to which plaintiff claims to be entitled. Merrill Lynch answered and filed a petition for order of arbitration. Plaintiff then filed a motion for order determining that the action is maintainable as a class action, and filed affidavits in support of five individuals moving to have themselves made parties of record as members of the class. The petition for arbitration was denied. The motion for class action and to admit the five persons submitting affidavits as plaintiffs was granted. Merrill Lynch appeals from the order denying arbitration.

Facts

In July 1958 plaintiff Ware became an employee of Merrill Lynch at its San Francisco office as an account executive, remaining such until March 1969 when he voluntarily terminated his employment. He then became an

employee of another securities broker, competitive with Merrill Lynch. As a full-time employee of Merrill Lynch he was eligible to participate in its profit sharing plan. From time to time Merrill Lynch made contributions to this plan (employees did not contribute) which were credited to plaintiff's account in the profit sharing trust fund. At the termination of his employment plaintiff's account in the fund was credited with 733 vested units and 1,258 unvested units. When plaintiff became eligible to participate in the plan he was given an explanatory brochure and a copy of the plan.

Article 11.1 of the plan provides:

"A participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation . . . and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation . . . shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960." On April 18, 1969 the Administrative Committee of the plan made a determination that plaintiff had voluntarily terminated his employment with Merrill Lynch and had entered into competitive employment. The Committee thereupon caused to be forfeited any and all rights plaintiff had in the plan.

Merrill Lynch is a member of the New York Stock Exchange which is registered under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) which act authorizes the enforcement of rules and bylaws promulgated by said exchange.

Rule 345 of the exchange requires the registration and approval by the exchange of any person employed by a member in the capacity of a registered representative. Plaintiff executed a written application for approval of

employment on Form RE-1 of the exchange and was approved and registered. Paragraph 30j of the RE-1 form executed by plaintiff states:

"I agree that any controversy between me and any . . . member organization arising out of my employment on the termination of my employment by and with such . . . member organization shall be settled by arbitration at the instance of any such party in accordance with the Constition and rules then obtaining of the New York Stock Exchange."

Defendant alleged in its petition for arbitration that all members of the class were subject to the above arbitration provision since each had individually executed the RE-1 form. This is not denied. Plaintiff contends that a class action cannot be arbitrated. Defendant claims that it is not trying to arbitrate a class action but seeking to arbitrate the dispute with the representative of the class under an agreement that also applies to all other members of the class as each has signed a similar agreement. Defendant's contention in this regard is well answered in *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal. App. 3d 668, 672, where the identical contract was attacked by a former employee of Merrill Lynch: "Respondent asserts that because he brought his action in behalf of the class of persons affected by the contract arbitration should not be required. But if all employees similarly situated have signed the same arbitration agreement as that which respondent challenges, all are equally bound. If the agreement is valid, it is valid as to all members of the class. It would be inappropriate to allow respondent and the other members of the class he claims to represent to evade the terms of the agreement simply by bringing their action together as a 'class' rather than as individuals."

Section 1281.2 of the Code of Civil Procedure provides in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement." No contention is made that defendant waived its right to arbitration as stated in paragraph 30j of the RE-1 form.

On the record there is no substantial conflict in the facts. Where, as here, the issue is one of law only, findings of facts are not required. (*Allstate Ins. Co. v. Orlando* (1968) 262 Cal. App. 2d 858, 867.) In *Loscalzo v. Federal Mut. Ins. Co.* (1964) 228 Cal. App. 2d 391, where petition for arbitration was denied without the trial court's indicating the basis for denial, and in *Bianco v. Superior Court* (1968) 265 Cal. App. 2d 126, where petition for arbitration was granted without the court's indicating the basis for such order, it was held that the reviewing court must determine the correctness of the ruling from the record, and in doing so must determine if the record supports any of the contentions of the parties opposing the arbitration. We proceed to make such determination.

Plaintiff opposed the granting of the petition for arbitration on three basic grounds: (1) no written agreement to arbitrate existed; (2) the contract was an adhesive one and therefore revoked; (3) the issue in dispute and the legality of the forfeiture provision cannot be arbitrated.

1. *Arbitration agreement.*

The written agreement to arbitrate did exist. (See *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 20

Cal. App. 3d 668, 671-672.) The RE-1 form expressly referred to the rules and regulations and constitution of the exchange, and contained an express representation by plaintiff to abide by them. At the time the RE-1 form was executed by plaintiff a rule of the exchange (Rule 347(b)) provided for arbitration between members and their employees arising out of the termination of the employment relationship. (2 CCH New York Stock Exchange Guide, par. 2347b.) Moreover, the RE-1 form which plaintiff admitted executing set forth in its entirety the arbitration clause 30j. Plaintiff's express representation to abide by the exchange rules charged him with the duty of knowing what the rules are. See *Gear v. Webster* (1968) 258 Cal.App.2d 57, where the appellant became a member of an association of realtors whose bylaws required submission to arbitration of controversies between members. "[B]y agreeing to abide by the bylaws appellant was bound to arbitrate her dispute with another member, here, respondent." (258 Cal.App.2d at p. 61.)

In *Larrus v. First National Bank* (1954) 122 Cal.App.2d 884, the plaintiffs opened a bank account and signed signature cards containing a printed statement that they agreed to be governed by the bylaws of the bank. Their attention was not called to the clause in dispute nor were they advised of the bank's rules. The court held the agreement binding. A reasonable person seeking employment in an industry as highly regulated as the securities exchange with knowledge of a registration requirement cannot escape the binding effect of arbitration rules referred to and expressly set forth in the RE-1 form, which he has signed, by claiming lack of knowledge of the rules integrated into the form.

The RE-1 form is a contractual agreement, even though it is headed "Application." In the application plaintiff stated "I have read the Constitution and Rules of the Board

of Governors of the New York Stock Exchange and, if approved, I hereby pledge myself to abide by the Constitution and Rules of the Board of Governors . . . as the same have been or shall be from time to time amended, and by all the rules and regulations adopted pursuant to the Constitution and by all practices of the Exchange."

The approval and registration by Merrill Lynch made the application a contract between the parties.

In *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* 20 Cal.App.3d 668, the identical situation arose as in this case. Frame was a former employee of Merrill Lynch who voluntarily left their employment and entered competitive employment. As did plaintiff here, he filed an action to have the forfeiture provision of his application for employment declared void. The defendant petitioned for an order requiring arbitration of all issues. The petition was denied by the trial court, which action the reviewing court held erroneous. Involved was the identical form of application for employment involved in this action. There, as does plaintiff here, Frame although he admitted signing the application contended that there was no binding agreement between him and Merrill Lynch for arbitration because there was no mutual assent to the arbitration provision as he was unaware of the clause because he did not read it. To this contention the reviewing court answered: "But failure to read a contract before signing is not in itself a reason to refuse its enforcement. (Oakland Bank of Commerce v. Washington (1970) 6 Cal.App.3d 793, 800.)" (*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* at p. 671; *Frederico v. Frick* (1970) 3 Cal.App.3d 872, 875.)

Just as plaintiff does here, Frame contended that Merrill Lynch was not a party to the agreement. The court said: "Respondent claims that appellant cannot enforce the agreement to arbitrate because appellant was not a party to it.

The arbitration agreement was indeed contained not in a contract form but in a New York Stock Exchange form, entitled 'APPLICATION FOR APPROVAL OF EMPLOYMENT OF REGISTERED REPRESENTATIVE.' But the form was an indispensable part of the arrangements by which respondent was employed by appellant. The subject matter of the 'application' was the approval of respondent's employment by appellant, the form was witnessed by an officer of appellant, and investigation and substantiation of the fact assertions in the application were entrusted to appellant. The application was part of the larger transaction by which appellant and respondent entered into a continuing employment relationship. Therefore, the arbitration provision is not unenforceable because of lack of mutuality." (*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* at pp. 671-672.)

2. *The legality of the forfeiture clause.*

Frame made the same contention in his case as does plaintiff here, concerning clause 1.11: "The profit-sharing plan under which respondent claims benefits contains a provision that an employee who voluntarily terminates his employment and works for a competitor forfeits his rights to benefits under the plan. Respondent contends that the forfeiture provision is unlawful as being in restraint of trade under Business and Professions Code section 16600. In *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal.2d 239, 242 (42 Cal.Rptr. 107, 398 P.2d 147), the court held invalid under section 16600 a closely analogous provision. In *Muggill* a retired employee went to work for a competitor of his former employer; retirement fund benefits were terminated under a clause similar to the one here in question.

We are persuaded that, under *Muggill*, the forfeiture provision is ineffective under California law.

* * * * * * *

". . . Business and Professions Code section 16600 explicitly declares that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.' The California Supreme Court in *Muggill v. Reuben H. Donnelley Corp., supra*, 62 Cal.2d 239, at page 242, has on closely similar facts held a forfeiture provision to be invalid. We conclude from the California Supreme Court's treatment of the problem that section 16600 does represent a 'strong public policy' of this state." (*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 20 Cal.App.3d at pp. 672, 673.) Thus, it is clear that the forfeiture clause is invalid and cannot be enforced here.

3. *Labor Code section 229*

Defendant contends that plaintiffs argument regarding Labor Code section 229 was not presented to the trial court and is newly raised on appeal. Therefore it should not be considered. If considered, defendant submits that it was reversible error by the trial court in failing to prepare mandatory findings of fact and conclusions of law.

Defendant's contention that the effect of Labor Code section 229 cannot be considered on appeal is without merit. A legal theory to sustain a judgment may be considered on appeal even though it was not raised in the trial court, as long as it does not raise factual issues not presented to the trial court. (*Allstate Ins. Co. v. Orlando, supra*, 262 Cal. App.2d 858, 867.) Facts sufficient to sustain such theory under Labor Code section 229 were presented to the trial court. Therefore, Labor Code section 229 should be considered in determining the correctness of the trial court's order.

The *Frame* court did not consider the effect of section 229 of the Labor Code on the arbitration agreement. This section provides that "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained *without regard to the existence of any private agreement to arbitrate.*" (Emphasis added.) Wages are defined in section 200 of the Labor Code as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

No cases have construed section 229 of the Labor Code, but the intent appears quite clear. While the strong public policy of the state favors arbitration (*Federico v. Frick, supra,* 3 Cal.App.3d 872, 875), the intent of the statute is to provide in the first instance a judicial forum where there exists a dispute as to wages. Since the intent is clear, the only determination which must be made is whether the profit sharing benefits constitute wages within Labor Code section 200, *supra.* "[P]ursuant to the present day concept of employer-employee relations, the term 'wages' should be deemed to include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation. [Citations.]" (*Wise v. Southern Pac. Co.* (1970) 1 Cal.3d 600, 607.) A bonus, offered as an incentive to attract employees, has been held to be wages. (*Hunter v. Ryan* (1930) 109 Cal. App. 736, 738.) Payments to a health and welfare fund by an employer (*People v. Alves* (1957) 155 Cal.App.2d Supp. 870, 872), payment of insurance premiums by an employer (*Foremost Dairies v. Industrial Acc. Com.* (1965) 237 Cal. App.2d 560, 580), payments to an unemployment insurance fund (*People v. Dennis* (1967) 253 Cal.App.2d Supp. 1075, 1077), and pension plan benefits (*Hunter v. Sparling* (1948)

87 Cal.App.2d 711, 725) are wages within the meaning of the statute. In its legal sense, the word "wage" has been given a broad, general definition so as to include compensation for services rendered without regard to the manner in which such compensation is computed. (*Estate of Hollingsworth* (1940) 37 Cal.App.2d 432, 436.)

In the profit sharing plan in question, it is stated that such employee benefits, a voluntary sharing by Merrill Lynch, etc. of its profits with its employees, is intended not only to reward the employees, but also to provide a nest egg for the future. All contributions to the plan are made by the employer. The employee's share is determined by the ratio that his compensation bears to the compensation of all eligible employees.

The profit sharing plan is clearly an inducement to employees by a plan through which they benefit financially in proportion to their compensation. Consequently, defendant's contributions to the plan should be considered wages within the meaning of Labor Code sections 200 and 299. [sic] Therefore, section 229 must apply to plaintiff's claim, giving him the right to bring his claim in court in spite of any agreement to arbitrate.

"Profit sharing ordinarily signifies the participation of employees with their employer in a given share of the profits of an enterprise by reason of their labor . . . ." (*Durkee v. Welch* (S.D.Cal. 1931) 49 F.2d 339, 341.)

Section 229 of the Labor Code was adopted in 1959 (Stats. 1959, ch. 1939, § 1, p. 4532). The California Arbitration Act was revised in 1961 (Stats. 1961, ch. 461, § 2, p. 1540 [now included in Code Civ. Proc., §§ 1280-1294.2]). The fact that the Legislature has not seen fit to amend or repeal section 229 in the approximately 11 years since the revision of the Arbitration Act precludes any claim that section 229 is no longer in effect.

There is nothing in the Arbitration Act to indicate that the public policy inherent in section 229, namely that an employee cannot be required to arbitrate a claim for wages, which arbitration might not take place in California, has changed in any respect.

We hold that the forfeiture provision of the agreement is illegal and that arbitration will not lie. It therefore becomes unnecessary to consider the other contentions of the parties.

The only issue before us on this appeal is the validity of the trial court's order denying respondent's petition for arbitration. Any other issues under the pleadings may of course be considered by the trial court.

It should be pointed out that the order making this a class action limits the plaintiffs to plaintiff Ware, the five persons designated as additional plaintiffs, and residents of California who voluntarily left the employ of Merrill Lynch and entered into employment with competitive firms and who were not paid profit sharing units by reason of Article 11.1.

Order affirmed.

Certified for publication.

BRAY, J.*

We concur:

DEVINE, P. J.

RATTIGAN, J.

*Retired Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

OPINION AND DECREE OF THE COURT OF APPEAL
in *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*

In the Court of Appeal of the State of California
First Appellate District, Division Four

Filed Oct 19 1971

1/Civil 28135

(Sup.Ct.No. P 16598)

Ronald Frame, a former employee of Merrill Lynch, Pierce, Fenner & Smith Incorporated, on behalf of himself and all other former employees similarly situated,

Plaintiff and Respondent,

vs.

Merrill Lynch, Pierce, Fenner & Smith Incorporated, a corporation,

Defendant and Appellant.

Merrill Lynch, Pierce, Fenner & Smith, Inc. appeals from an order denying its petition for arbitration of issues raised in an action brought by respondent Ronald Frame.

Respondent, a former employee of appellant, commenced an action seeking a determination that a portion of a purported agreement between appellant and respondent, which provides for forfeiture of profit-sharing rights by any employee of appellant who resigns and then engages in competition with appellant, is void as a restraint on competition condemned by Business and Professions Code section 16600. Appellant pleaded as a defense that respondent had executed an agreement to arbitrate any dispute. Concurrently, appellant petitioned the court for an order requiring arbitration of all issues (see Code Civ. Proc., § 1281.2). The

trial court denied appellant's petition for arbitration, upon the determination (made on affidavits) that "there is no binding agreement between Ronald Frame and defendant to arbitrate this controversy." The present appeal followed. We have concluded that it was error to withhold giving effect to the arbitration clause.

We note preliminarily that the order denying arbitration was based on no findings of fact or conclusions of law other than the recital that "there is no binding agreement . . . to arbitrate this controversy." Although Code of Civil Procedure section 1291 might appear to create an absolute requirement of findings to support such an order, it has been held that the requirement of section 1291 must be read as conforming to the general rules governing findings of fact in civil actions. (*Allstate Ins. Co. v. Orlando* (1968) 262 Cal.App.2d 858, 867.) Here neither party requested findings of fact or conclusions of law; therefore the court's failure to make findings was not error. (Code Civ. Proc., § 632.) Therefore, the order denying arbitration is to be upheld if the record supports it on any theory.

It was a condition of respondent's employment that he be approved by the New York Stock Exchange, of which appellant is a member. Respondent admits that he signed a stock exchange application form which contained an agreement to arbitrate "any controversy between me and any member or member organization arising out of my employment or the termination of my employment by and with such member or member organization . . ." Respondent contends that the agreement to arbitrate was unenforceable because there was no mutual assent to that provision. Specifically he contends that he was unaware of the clause because he did not read it. But failure to read a contract before signing is not in itself a reason to refuse its en-

forcement. (*Oakland Bank of Commerce v. Washington* (1970) 6 Cal.App.3d 793, 800.)

Respondent claims that appellant cannot enforce the agreement to arbitrate because appellant was not a party to it. The arbitration agreement was indeed contained not in a contract form but in a New York Stock Exchange form, entitled "APPLICATION FOR APPROVAL OF EMPLOYMENT OF REGISTERED REPRESENTATIVE." But the form was an indispensable part of the arrangements by which respondent was employed by appellant. The subject matter of the "application" was the approval of respondent's employment by appellant, the form was witnessed by an officer of appellant, and investigation and substantiation of the fact assertions in the application were entrusted to appellant. The application was part of the larger transaction by which appellant and respondent entered into a continuing employment relationship. Therefore, the arbitration provision is not unenforceable because of lack of mutuality.

Respondent next attempts to invoke the doctrine of adhesion contracts to invalidate the arbitration clause. It is true that where the bargaining strength of contracting parties is unequal a contractual provision may be construed to give effect to the reasonable expectations of the weaker party when necessary to avoid injury or unfair imposition which it is shown would be the result of giving literal effect to the terms of the contract. (See Comment (1967) 1 U.S.F. L.Rev. 306.) Here, assuming that the contract was adhesory, it is not shown that arbitration would be contrary to the reasonable expectations of any party or that any loss or unfair imposition would result. Therefore no basis exists in the present case for using the doctrine of adhesion contracts to avoid arbitration. (*Cf. Federico v. Frick* (1970) 3 Cal.App.3d 872, 875.)

Respondent asserts that because he brought his action in behalf of the class of persons affected by the contract arbitration should not be required. But if all employees similarly situated have signed the same arbitration agreement as that which respondent challenges, all are equally bound. If the agreement is valid, it is valid as to all members of the class. It would be inappropriate to allow respondent and the other members of the class he claims to represent to evade the terms of the agreement simply by bringing their action together as a "class" rather than as individuals.

The profit-sharing plan under which respondent claims benefits contains a provision that an employee who voluntarily terminates his employment and works for a competitor forfeits his right to benefits under the plan.[1] Respondent contends that the forfeiture provision is unlawful as being in restraint of trade under Business and Professions Code section 16600. In *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal.2d 239, 242, the court held invalid under section 16600 a closely analogous provision. In *Muggill* a retired employee went to work for a competitor of his former employer; retirement fund benefits were terminated under a clause similar to the one here in question. We are persuaded that, under *Muggill*, the forfeiture provision is ineffective under California law. Appellant points out, however, that the contract contains an express provision that the rights of the parties will be governed by the law of New York. It is conceded that under New York law the forfeiture provision is valid; it would not be treated

1. "11.1 A Participant who, in the determination of the Committee, voluntarily terminates his employment with the Corporation or provokes his termination and engages in an occupation which is, in the determination of the Committee, competitive with the Corporation, or any affiliate or subsidiary thereof, shall forfeit all rights to any benefits otherwise due or to become due from the Trust Fund with respect to units credited for fiscal years subsequent to the fiscal year ended December 30, 1960."

as being in restraint of trade as it would be under California law. (See *Kristt v. Whelan* (1957) 164 N.Y.S.2d 239, aff'd 5 N.Y.2d 807, 809.)

The next question is whether the provision specifying New York law is valid. As a general rule, it is said that contracting parties may by agreement specify what law is to control their contract if "enforcement of the contract by a local court in accordance with the foreign law agreed to be controlling does not result in an evasion of the settled public policy or a statute of the forum protecting its citizens." (11 Cal.Jur.2d, § 55, p. 138.)

We recognize that the choice-of-law question is not foreclosed by the existence of an applicable California statute where New York State has substantial contacts with the transaction and the parties, if no attempt to evade California law appears. But an agreement designating applicable law will not be given effect if it would violate a strong California public policy. (*Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal.App.2d 11, 20; *cf. People v. Globe & Rutgers Fire Ins. Co.* (1950) 96 Cal.App.2d 571, 575 [upholding contract provisions designating applicable law].) Here Business and Professions Code section 16600 explicitly declares that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The California Supreme Court in *Muggill v. Reuben H. Donnelley Corp., supra*, 62 Cal.2d 239, at 242, has on closely similar facts held a forfeiture provision to be invalid. We conclude from the California Supreme Court's treatment of the problem that section 16600 does represent a "strong public policy" of this state. Therefore the agreement for application of New York law must not be allowed to defeat that policy.

It does not follow, however, that the entire contract was necessarily unlawful. Issues of law and fact may emerge

as to the severability of the unlawful penalty provision. A latent question exists as to whether the agreements of the parties may be construed as applying only to such permissible subjects of restraint as breaches of confidence and misappropriation of trade secrets. Other questions may be raised as to the time and circumstances of respondent's employment and the amount of any benefits earned and remaining unpaid. All of these matters, whether they involve questions of law or questions of fact, are in the first instance properly subject to arbitration. (*In re Frick* (1933) 130 Cal.App. 290, 292.) If the award wrongly gives effect to an unlawful contractual provision, it will be subject to attack on the hearing of any petition for confirmation. (See *Loving & Evans v. Blick* (1949) 33 Cal.2d 603.)

The order denying arbitration is reversed.

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CHRISTIAN, J.

We concur:

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DEVINE, P. J.

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DAVID, J.*

*Assigned by the Chairman of the Judicial Council.